Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON T. RIBAUDO,
PRIVATE, UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Section 871 of Title 10, United States Code, Congress requires the United States Court of Appeals for the Armed Forces to review or reject all petitions arising from the decision by a service Court of Criminal Appeals before a military service can carry out a punitive discharge or death sentence. Appellant died after the Navy-Marine Corps Court of Criminal Appeals decided his case, but before he had an opportunity to present his petition to the Court of Appeals for the Armed Forces. The Court of Appeals for the Armed Forces allowed the Department of the Navy to execute Appellant's punitive discharge adjudged at trial without civilian review of his petition. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction to establish a uniform policy of abatement *ab initio* for all military service courts?

2. Whether in light of *Halbert v. Michigan*, 125 S. Ct. 2582 (2005), the current policy of abatement *ab initio* established by the Court of Appeals for the Armed Forces is correct in light of its statutory responsibilities.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATUTORY PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 3

CONCLUSION 14

APPENDIX A 1*a*

APPENDIX B 11*a*

APPENDIX C 18*a*

APPENDIX D 20*a*

APPENDIX E 23*a*

TABLE OF AUTHORITIES

United States Constitution

U.S. CONST. art. I, § 8, cl. 14 7

United States Supreme Court Cases

Clinton v. Goldsmith, 526 U.S. 529 (1999) 5
Halbert v. Michigan, 125 S. Ct. 2582 (2005) ..... i, 6
Rostker v. Goldberg, 453 U.S. 57 (1981) 7
Weiss v. United States, 510 U.S. 163 (1994) 7

Federal Statutes

10 U.S.C. § 866 2
10 U.S.C. § 867 3,5-7
10 U.S.C. § 871 3
10 U.S.C. § 912 2
10 U.S.C. § 934 2
28 U.S.C. § 1259 (3) 1

United States Court of Appeals for the Armed Forces

United States v. Rorie, 58 M.J. 399 (C.A.A.F. 2003) 3,5
United States v. Jones, 61 M.J. 80 (C.A.A.F. 2005) 4

United States Court of Appeals for the 2nd Circuit

United States v. Wright, 160 F.3d 905 (2d Cir. 1998) 6

United States Court of Appeals for the 7th Circuit

United States v.Moehlenkamp, 557 F.2d 126 (7th Cir. 1977) 5

Congressional Hearings

Uniform Code of Military Justice: Hearing on H.R. 2498 Before the House Comm. on Armed Services, Subcomm. No. 1, 81st Cong. 759 (March 14, 1949) 10

American Law Reports

John H. Derrick, Annotation, Abatement Effects of Accused's Death Before Appellate Review Of Federal Criminal Convictions, 80 A.L.R. Fed. 446 (2004) 6, 7

PETITION FOR A WRIT OF CERTIORARI

Appellant petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces entered in his case on January 24, 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-10a) is reported at 62 M.J. 286. The *en banc* opinion of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 11a-17a) is reported at 60 M.J. 691. A prior opinion of the Navy-Marine Corps Court of Criminal Appeals affirming Petitioner's court-martial conviction (App., *infra*, 18a-19a) is unreported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Forces was entered on January 24, 2006. A motion to reconsider was denied on February 15, 2006. This jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are reproduced at App., *infra*, 20a-22a.

STATEMENT

A special court-martial composed of a military judge alone tried Appellant on February 20, 2003. In accordance with his pleas, Appellant was convicted of unauthorized absence, wrongful drug use, and breaking restriction in violation of Articles 86, 112(a), and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 912(a), 934. He was sentenced to confinement for one hundred days, forfeiture of $766.00 pay per month for a period of three months, and a bad-conduct discharge. The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence. App., *infra,* 18-19a.

Appellant subsequently died within the sixty-day time period of filing a petition to the United States Court of Appeals of the Armed Forces. Appellate defense counsel subsequently filed a motion to reconsider before NMCCA asking the court to abate the proceedings *ab initio*. Sitting *en banc,* NMCCA affirmed the prior findings and sentence. The court held that its mandatory review function pursuant to Article 66, UCMJ, 10 U.S.C. § 866 was concluded after Appellant's decision had been rendered. *Id. at* 11a-17a.

Without review of Appellant's petition on the merits, the United States Court of Appeals for the Armed Forces affirmed the service court's decision and established a new uniform policy of abatement *ab initio* for all military courts. *Id.* at 1a-10a. The decision allowed the Department of the Navy to carry out Appellant's adjudged punitive discharge. *Id.* at 10a.

The court of appeals concluded that its review was an appeal of discretion and that only review before a service court was an appeal of right. The court of appeals noted that an earlier decision recognized that the court's jurisdiction under Article 67, UCMJ, 10 U.S.C. 867(a)(3) (*Id.* at 20a.)

was unique when compared with that of other federal appellate courts. The court of appeals also reasoned that its jurisdiction was "more akin" to that exercised by the United States Supreme Court under its certiorari jurisdiction. *Id.* at 1a-10a. Despite being raised by Appellant, the court of appeals failed to address 10 U.S.C. § 871.

REASONS FOR GRANTING THE PETITION

The court of appeals invalidated an Act of Congress based upon an unspecified plenary power. By doing so, the court of appeals deprived Appellant his statutory right to aver his honorable service before the highest military court in the nation. The court of appeal's decision also conflicts with the unanimity of the civilian federal circuit courts of appeals that currently follow abatement *ab initio*. The court's expansion of its jurisdiction to establish a uniform legal policy absent authority by Congress was error. Accordingly, this Court's review is warranted.

1. Appellant was deprived of his right to civilian review before the highest military court in the nation. All parties agree that pursuant to Article 71, UCMJ, 10 U.S.C. § 871, the Department of the Navy cannot carry out Appellant's adjudged bad-conduct discharge without the Court of Appeals for the Armed Forces reviewing his petition for appeal. App., *infra,* 21-22a.

But the court of appeals ignored the statute in cases where appellants die during the appellate process. The court of appeals found that Article 71, UCMJ, 10 U.S.C. § 871, "no more compels that we adopt a policy of abatement ab initio than it compels the United States Supreme Court to have such a policy with respect to its review of military convictions." *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003).

This was error. There is no indication that Congress

desired any exceptions to Article 71, UCMJ, 10 U.S.C. 871. To the contrary, the legislative history reveals that Congress intended for the Court of Appeals for the Armed Forces to review all petitions that are submitted to the court. *Uniform Code of Military Justice: Hearing on H.R. 2498 Before the House Comm. on Armed Services, Subcomm. No. 1,* 81st Cong. 759 (March 14, 1949).[1] Before any adjudged punitive discharge was carried out, Congress desired both a military and civilian appellate court to independently review the court-martial.

Civilian oversight is a fundamental tenant of the American military system and a necessary check on the powers of the military. To arbitrarily stop the appellate review process without civilian review prejudices a large amount of appellants who could have otherwise had their cases reversed. *See, e.g., United States v. Jones,* 61 M.J. 80 (C.A.A.F. 2005) (Civilian appellate court disagreeing with service court over prejudice from unreasonable posttrial delay).

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[1] Colonel OLIVER. And in your bill last year, Mr. Elston, you provided for some additional formal review, without going into the details, to be certain that there was a complete review.

Mr. ELSTON. I appreciate that, and that was because we wanted to be certain that there was a complete review.

Colonel OLIVER. That is right.

Mr. ELSTON. Of every case.

Colonel OLIVER. That is right.

By ignoring a statute of Congress and establishing its own military-wide policy on abatement *ab initio*, the court of appeals has invoked a previous unrecognized plenary power over the service courts. The decision by the court of appeals extended its policy to all uniform service courts. App., *infra*, 10a. The court of appeals relied on the fact that abatement *ab initio* was a matter of policy instead of a matter of law. *Id. at* 10a. *See also Rorie*, 58 M.J. at 405.

This Court has noted that the Court of Appeals for the Armed Forces was not given authority by Congress to oversee all matters arguably related to military justice or to act as a plenary administrator even of criminal judgments it has affirmed. *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999). The Court of Appeals for the Armed Forces can take actions only with respect to matters of law. App., *infra*, 21a. Appellant's decision asserted a broad, erroneous view of an unspecified plenary power that falls outside the limits of both Article 67, UCMJ, 10 U.S.C. § 867 and this Court's decision in *Goldsmith*.

In sum, only Congress has the power to establish policy over the military courts. The Court of Appeals for the Armed Forces ignored clear statutory language by establishing a military-wide policy of abatement *ab initio*.

2. The Court of Appeals for the Armed Forces is the only federal court of appeals that does not follow abatement *ab initio*.

While this Court has never outlined a rational for abatement *ab initio*, the federal circuits have uniformly found that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him. *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977). *See also John H. Derrick, Annotation, Abatement Effects of Accused's*

Death Before Appellate Review Of Federal Criminal Convictions, 80 A.L.R. Fed. 446 (2004). All federal circuits agree that only when an appeal of right is completed that the interests of justice have been served. *United States v. Wright*, 160 F.3d 905, 908 (2d Cir. 1998).

The court of appeal's self-classification of Petitioner's appeal as an appeal of discretion is erroneous in light of its statutory responsibilities. The court of appeals based its decision on the fact that it considered itself a court of discretionary review. The court of appeals relied upon the discretionary nature of its docket to conclude that its jurisdiction was more akin to this Court. App., *infra,* 5a.

The court of appeals' classification conflicts with this Court's decision in *Halbert w. Michigan*, 125 S. Ct. 2582 (2006). In *Halbert,* the Michigan Court of Appeals changed its procedural rules to a petition-based system. Relying on the discretionary nature of its docket, the state of Michigan argued that appellants did not need to be afforded counsel as the appeal was now discretionary. *Id.* at 2588, 2591.

This Court rejected Michigan's reliance on the procedural rules of the appellate court and instead focused on the function of the court. The court noted that the function of the Michigan Court of Appeals is to look to the merits of the claims made in the application. It is a court focused on correcting legal errors. In contrast, a discretionary review is to an appellate court that is focused on matters other than errors by a lower court, e.g., the involvement of a matter of significant public interest. *Id.* at 2591.

As this Court recently made clear, the question whether a appeal is one of right or discretion turns on the function of the court. Congress did not intend to create a right of discretionary review when it passed 10 U.S.C. § 867. Instead, Congress intended for a review from both a military and civilian appellate court. *Uniform Code of Military*

Justice: Hearing on H.R. 2498 Before the House Comm. on Armed Services, Subcomm. No. 1, 81st Cong. 759 (March 14, 1949)).

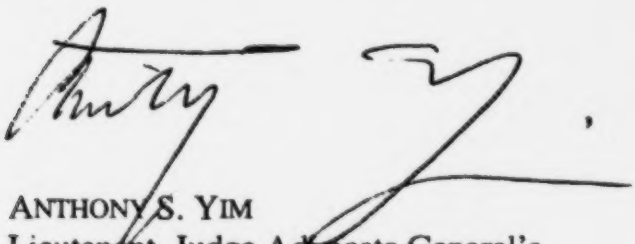
In the federal appellate system, there is only one Court that is a court of discretionary review. Article 67a, 10 U.S.C. 867a, permits this Court to review decisions by the Court of Appeals for the Armed Forces. Thus it was error for the court of appeals to conclude that it possessed the power to establish national legal policy for the military when Congress permitted this Court to review its decisions.

The court of appeals' decision raises matters fundamental to the rights bestowed by Congress to servicemembers. Great deference is owed to the judgments of the political branches in this area. *See, e.g., Weiss v. United States,* 510 U.S. 163, 177 (1994) ("Judicial deference ... 'is at its apogee' when reviewing congressional decisionmaking" in the military context) (quoting *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981)); *Loving v. United States,* 517 U.S. 748, 768-73 (1996). Despite that principle, the Court of Appeals for the Armed Forces, an Article I court, ignored an Act of Congress exercising the Legislative Branch's power under the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14 – and did so by extending its jurisdiction to a function reserved only for this Court alone. This holding warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APRIL 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 05-0117
Crim.App. No. 200301672

UNITED STATES, Appellee

v.

Brandon T. RIBAUDO, Private
U.S. Marine Corps, Appellant

October 20, 2005, Argued
January 24, 2006, Decided

OPINION:

Judge ERDMANN delivered the opinion of the court.

Private (E-1) Brandon T. Ribaudo was tried by special court-martial and entered guilty pleas to unauthorized absence, using marijuana and twice breaking restriction in violation of Articles 86, 112a and 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § § 886, 912a, 934 (2000)*. A military judge sentenced Ribaudo to a bad-conduct discharge, confinement for one hundred days and forfeiture of $ 776.00 pay per month for three months. Pursuant to a pretrial agreement, the convening authority approved the

sentence, but suspended confinement in excess of seventy-five days for a period of twelve months. The United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence in a memorandum decision on December 4, 2003. United States v. Ribaudo, No. NMCCA 200301672 (N-M. Ct. Crim. App. Dec. 4, 2003). Sitting en banc, the Navy-Marine Corps court subsequently denied Ribaudo's motion to abate. *United States v. Ribaudo, 60 M.J. 691, 694 (N-M. Ct. Crim. App. 2004).*

An appellant is entitled to an appeal of right and his death prior to completion of that appeal generally entitles him to abatement of the proceedings ab initio. *United States v. Rorie, 58 M.J. 399, 400 (C.A.A.F. 2003).* Ribaudo died after the Court of Criminal Appeals rendered its decision under Article 66(c), UCMJ, *10 U.S.C. § 866(c) (2000)*, but before the period to request reconsideration of that decision expired. Ribaudo's appellate defense counsel argues that he is entitled to abatement ab initio because his appeal of right was not complete. We hold that once a Court of Criminal Appeals issues its decision under *Article 66(c)*, UCMJ, an appellant has received his appeal of right and is no longer entitled to application of the policy of abatement ab initio.

BACKGROUND

Ribaudo's appellate defense counsel was served with a copy of the Court of Criminal Appeals' decision on the day it was issued, December 4, 2003. Twelve days later, Ribaudo died.

Apparently without knowledge of Ribaudo's death, constructive service of the Court of Criminal Appeals' decision was initiated on January 13, 2004, when a copy of that decision was sent to Ribaudo by certified mail. See Article 67(b)(2), UCMJ, *10 U.S.C. § 867(b)(2) (2000).* No petition for grant of review was filed with this court by

March 15, 2004, the date upon which Ribaudo's sixty days to petition this court would have expired based upon the constructive service.

A supplementary court-martial order was subsequently issued on April 30, 2004, executing Ribaudo's bad-conduct discharge. At that point, no petition for reconsideration had been filed at the court below, nor had Ribaudo petitioned this court for a grant of review. On June 4, 2004, appellate defense counsel filed a motion before the Court of Criminal Appeals to vacate the final judgment of the lower court and set aside the findings and sentence. Sitting en banc, the Navy-Marine Corps Court of Criminal Appeals treated the motion to vacate and set aside as a motion to abate the proceedings ab initio, and denied the motion. *Ribaudo, 60 M.J. at 693 n.1.* We granted review to consider the action of the en banc Court of Criminal Appeals in light of our decision in *United States v. Rorie.* n1

n1 We granted review of the following issue:

> WHETHER APPELLANT WAS DEPRIVED OF A SUBSTANTIAL LEGAL AND FACTUAL REVIEW OF HIS CASE WHEN HE DIED AFTER THE COURT OF CRIMINAL APPEALS AFFIRMED HIS CONVICTION, BUT BEFORE THE TIME PERIOD FOR RECONSIDERATION HAD PASSED, IN VIOLATION OF THE CONSTITUTION AND *UNITED STATES v. RORIE, 58 M.J. 399 (C.A.A.F. 2003).*

DISCUSSION

Ribaudo's appellate defense counsel makes two arguments. He initially argues that when Ribaudo died, the time for requesting the Court of Criminal Appeals to reconsider its decision had not passed and his appeal of right was not complete. Thus, consistent with *Rorie*, the appellate defense counsel claims Ribaudo's conviction must be abated ab initio. He next argues in the alternative that *Rorie* was wrongly decided because this court's review under *Article 67*, UCMJ, is not discretionary and because this court is the only "federal appellate circuit" that does not adhere to a policy of abatement ab initio. Thus Ribaudo's appellate defense counsel suggests that *Rorie* should be reconsidered, that the policy on abatement at this court should be changed, and that this court should abate Ribaudo's proceedings ab initio.

The Government disputes these assertions. The Government argues that Ribaudo received his appeal of right before the Court of Criminal Appeals and that the subsequent discretionary decision to reconsider in light of Ribaudo's death did not mandate abatement ab initio. The Government disagrees that abatement ab initio is required at this court and argues that *Rorie* was correctly decided in light of the discretionary nature of this court's review under *Article 67(a)(3)*, UCMJ. We turn first to our decision in *Rorie*.

In *Rorie*, we addressed the effect of an appellant's death while his case was pending review before this court. Appellant Rorie died shortly before his sixty days within which to petition this court for a grant of review had expired. After that time expired, Rorie's appellate defense counsel filed a petition for grant of review and a motion to abate the proceedings. This court adopted a policy of not abating proceedings ab initio for cases before the court under *Article 67(a)(3)*, UCMJ. In adopting that policy we considered the same argument about the nature of this court's petition

jurisdiction that Ribaudo's appellate defense counsel makes now. We concluded that this court's statutory jurisdiction under *Article 67(a)(3)*, UCMJ, was unique when compared with that of other federal appellate courts and that our jurisdiction was "more akin" to that exercised by the United States Supreme Court under its certiorari jurisdiction. *Rorie, 58 M.J. at 405*. Specifically, we stated:

> There can be little doubt that this Court exercises discretionary review with respect to our petition docket. "The question of what cases are heard by the [Court of Appeals for the Armed Forces] is a matter of internal management, properly left to that Court's decision in accordance with guidelines expressed in that Court's rules." S. Rep. No. 98-53, at 34 (1983). The discretionary nature of this Court's petition jurisdiction is more analogous to the Supreme Court's discretionary certiorari practice.

Id. (second set of brackets in original).

We adhere to the conclusion of *Rorie*. Appeals to the Circuit Courts of Appeal are a matter of right. *United States v. Christopher, 273 F.3d 294, 296 (3d Cir. 2001)*. See *28 U.S.C. § § 1291-1292 (2000)*. This court exercises discretion over its petition docket and review under *Article 67(a)(3)*, UCMJ, is discretionary with this court. Ribaudo's appellate defense counsel presents nothing to persuade us that we should abandon the policy established in *Rorie* and we decline to do so. However, as we recognized in *Rorie*, review before the Courts of Criminal Appeals is different.

Review by a Court of Criminal Appeals pursuant to *Article 66, UCMJ*, is an appeal of right. *Rorie, 58 M.J. at 406*; see also *Article 66(b)*, UCMJ. Thus, *Rorie* recognized

that different rules may apply with respect to abatement at the Courts of Criminal Appeals. The general rule favors abatement ab initio pending an appeal of right. See *United States v. Pogue, 305 U.S. App. D.C. 224, 19 F.3d 663, 665 (D.C. Cir. 1994)*. It is the "longstanding and unanimous view of the lower federal courts that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him." *United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977)*. It is not until that appeal of right is complete that we can rest assured the interests of justice have been served. See *United States v. Wright, 160 F.3d 905, 908 (2d Cir. 1998)*.

Rorie did not dictate a rule of abatement ab initio for the Courts of Criminal Appeals because that issue was not before us. Rather, we left "to those courts or the Judge Advocates General to establish the parameters of a policy of abatement in the event that an appellant dies pending review at a Court of Criminal Appeals." *Rorie, 58 M.J. at 407*. There is nothing before us to demonstrate that the Judge Advocates General have prescribed a uniform rule of abatement for the Courts of Criminal Appeals. See *Article 66(f)*, UCMJ. Thus we turn to the decisions of the Courts of Criminal Appeals dealing with abatement.

In *United States v. Hubbert, 61 M.J. 705, 705 (C.G. Ct. Crim. App. 2004)*, the Coast Guard Court of Criminal Appeals abated the proceedings. There the appellant had died after the case had been forwarded to that court but before any briefs had been filed. Id. In *United States v. Robinson, 60 M.J. 923, 925 (A. Ct. Crim. App. 2005)*, the Army Court of Criminal Appeals abated proceedings. The Army court initially affirmed the findings and sentence in that case. *Id. at 923*. Robinson's counsel later filed a motion for reconsideration, motion to vacate final judgment, and a

motion to abate proceedings because Robinson had died prior to the court's initial decision being rendered. *Id. at 924*. In both of these cases the appellant's death preceded the court's initial decision under *Article 66*, UCMJ. In both instances the courts were correct -- death during the pendency of an appeal of right abates the proceedings ab initio.

This case presents us with different facts. As noted, Ribaudo died after the Court of Criminal Appeals had issued its initial decision affirming the findings and sentence. A properly constituted Court of Criminal Appeals had reviewed Ribaudo's case and determined that the findings were factually and legally correct and that the sentence was lawful and appropriate. Hence, *Article 66(c)*, UCMJ, had been fulfilled and no further proceedings were required. Ribaudo received the appeal of right to which he was entitled and abatement ab initio was not required.

Ribaudo's appellate counsel argues that a Court of Criminal Appeals' review includes the right to seek reconsideration either by the panel deciding the case or by the court sitting en banc. Ribaudo's appellate counsel is mistaken in his assertion that Ribaudo has a right to reconsideration. Navy-Marine Corps Court of Criminal Appeals Rule 4-8.4 reflects that the decision to reconsider either in panel or en banc is discretionary with the court:

> a. Upon motion or suggestion by a party within 30 calendar days after counsel's receipt of the decision, or upon motion or suggestion by appellant within 30 calendar days after appellant's receipt of the decision, the Court may reconsider a decision previously rendered by it, provided that jurisdiction of the case has not been obtained by the United States Court of Appeals for the Armed Forces. . . .

> b. The motion to reconsider may request en banc reconsideration. Cf. Rule 6-1. An appropriate order will be published when a majority of the Court votes to grant en banc consideration or reconsideration.

Emphasis added. This discretionary authority to reconsider a decision does not alter the conclusion that an appellant's appeal of right is complete when the lower court issues its decision.

We are aware that precedent on this matter is not entirely consistent. In *United States v. Roettger, 17 M.J. 453 (C.M.A. 1984)*, this court addressed the power of the lower military courts to abate proceedings during the period when "the appellate court could reconsider its decision on its own motion or at the request of appellate defense counsel." *Id. at 457.* The court held that "during the period that a petition for reconsideration could be filed" there was "no legal impediment to the lower court's exercising its abatement powers" and that the lower court had "incorrectly denied" a motion for abatement based on Roettger's death seven days after the lower court's decision and before Roettger had petitioned this court. Id. In *United States v. Lange, 18 M.J. 162 (C.M.A. 1984)*, this court affirmed the lower court's authority to abate where "the period for reconsideration of this decision by the lower court on its own motion had not yet expired." *Id. at 163.*

In contrast, in *United States v. Ward, 54 M.J. 390 (C.A.A.F. 2001)*, the appellant died one week after this court affirmed the decision of the lower court. *Id. at 390-91.* Appellant then filed a petition for reconsideration which sought "abatement ab initio due only to death." *Id. at 391.* Although noting that the issue of abatement ab initio was not

without dispute, this court denied the petition for reconsideration finding that Ward had been accorded "full review" and that "the interests of justice [had] been met." Id. While *Rorie* changed the policy on abatement ab initio before this court, we find that the rationale of Ward remains applicable to the instant case.

This opinion should not be viewed as infringing on the Court of Criminal Appeals' discretion to entertain a timely and meritorious motion for reconsideration or for a hearing en banc. In the event that the Court of Criminal Appeals grants reconsideration and withdraws its initial decision or opinion, an appellant's appeal of right cannot be said to be complete until a new decision or opinion is issued. Similarly, where the Court of Criminal Appeals decides to consider a case en banc, *Article 66*, UCMJ, review cannot be considered complete until the decision of the court en banc is issued. n2

> n2 Should an appellant die prior to an opinion on reconsideration or en banc, that appellant would have died prior to completion of his appeal of right and therefore be entitled to abatement ab initio. However, should the Court of Criminal Appeals deny a motion for reconsideration or a hearing en banc, the initial decision or opinion of the court remains valid for purposes of abatement ab initio.

We therefore see no basis in law to alter the policy determination of the Navy-Marine Corps Court of Criminal Appeals that an appellant who dies after a decision under *Article 66(c)*, UCMJ, has been issued is not entitled to abatement of the proceedings against him ab initio. To the extent that our decisions in *Roettger* and *Lange* are inconsistent with this decision, those cases are overruled.

CONCLUSION

We hold that the Navy-Marine Corps Court of Criminal Appeals did not deprive Ribaudo of any substantive legal or factual review of his findings or sentence by declining to abate the proceedings ab initio based upon Ribaudo's death after that court had issued its decision in the case. The lower court properly exercised the authority we left to that court in *Rorie*, establishing a policy on abatement for cases before that court. In light of the fact that the Judge Advocates General have not acted to establish a uniform rule for the Courts of Criminal Appeals, and to ensure consistency among the service Courts of Criminal Appeals, we extend the decision of the Navy-Marine Corps Court of Criminal Appeals as the rule for each service court. Where an appellant dies after a Court of Criminal Appeals' decision affirming the findings and sentence under *Article 66(c)*, UCMJ, the appellant is not entitled to abatement ab initio. n3

n3 This rule will not apply to any case reviewed by a service court where the decision of that court may require further review under *Article 66*, UCMJ. In such instances, the appeal of right is not complete and the policy favoring abatement ab initio remains intact. Nor does this rule reflect a policy decision for cases coming to this court for review pursuant to *Article 67(a)(1)* or *(2)*, UCMJ. See *United States v. Rorie, 58 M.J. 399, 407 n.7 (C.A.A.F. 2003).*

DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

APPENDIX B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE THE COURT *EN BANC*

UNITED STATES

v.

Brandon T. RIBAUDO
Private (E-1), U.S. Marine Corps

NMCCA 200301672
Decided 16 September 2004

Sentence adjudged 20 February 2003. Military Judge: J.P. Colwell. Review pursuant to Article 66(c), UCMJ, of convened by Commanding Officer, Marine Corps Combat Service Support Schools, Training Command, Camp Lejeune, NC.

LCDR BRENT FILBERT, JAGC, USNR, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, wrongfully using marijuana, and two specifications of breaking restriction, in violation of Articles 86, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 100 days, and forfeiture of $766.00 pay per month for 3 months. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 75 days.

We affirmed the findings and sentence in an unpublished opinion. *United States v. Ribaudo,* No. 200301672, unpublished op. (N.M.Ct.Crim.App. 4 Dec 2003). The appellant's appellate defense counsel (ADC) was served with the decision on the same day it was issued. The appellant died 12 days after the date of our decision while he was on appellate leave. A copy of our decision was sent to the appellant by certified mail on 10 January 2004. Neither the appellant nor his ADC requested reconsideration before our court or filed a petition for a grant of review to the Court of Appeals for the Armed Forces (CAAF). Our opinion became final on 30 April 2004 with the issuance of the supplemental court-martial order that ordered the punitive discharge into execution.

On behalf of the deceased appellant, the ADC filed a motion to vacate[1] the final judgment and set aside the findings and sentence on 4 June 2004. We have carefully

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[1] We will refer to and treat this request as a Motion to Abate the Proceedings Ab Initio.

considered the record of trial, the ADC's motion, the Government's opposition to the motion, and the ADC's reply brief. We deny the ADC's motion to abate.

Jurisdiction

The Government asserts that we do not have jurisdiction to decide this motion because the appellant did not file a request for reconsideration within the 60-day time limit (as extended) established by Rule 19, Courts of Criminal Appeals Rules of Practice and Procedure, 44 M.J. LXXI (1996). This time limit runs concurrently with the 60-day time limit in which to file a petition for a grant of review with the United States Court of Appeals for the Armed Forces (C.A.A.F. RULE 19(a)).

We previously held that the death of an appellant, within the time limit in which to file a request for reconsideration and in the absence of the filing of a petition for a grant of review or a certificate of review before the CAAF, tolled the time limit such that we retained jurisdiction to decide the motion to abate. *United States v. Foster*, 27 M.J. 659, 660 (N.M.C.M.R. 1988)(en banc). The Government argues that our decision in *Foster* was incorrect since CCA Rule 19(d) expressly forbids the extension of the reconsideration time limit by CCA Rule 24 (time limits may be extended as required for a full, fair, and expeditious consideration) or CCA Rule 25 (the requirements or provisions of the rules may be suspended for good cause).

In *Foster*, we acknowledged that the time limit of 60 days for reconsideration could not be extended under CCA Rules 24 or 25. Instead, we held that the "appellant's death . . . *tolled* the running of the time period in which this Court could still exercise its jurisdiction." *Id.* (emphasis added).

After careful review, we continue to adhere to our earlier ruling that the death of the appellant tolls the time limit under CCA Rule 19. Thus, we hold that we have jurisdiction to rule on this motion.

We also note that, under the facts of this case, the ADC could have instead filed the motion to abate with the CAAF. In *United States v. Rorie*, 58 M.J. 399, 400 (C.A.A.F. 2003), the Government conceded that the CAAF had jurisdiction to decide the motion for abatement where the appellant died 57 days after constructive service of the decision by the United States Army Court of Criminal Appeals that affirmed the findings and sentence.

We conclude that when an appellant dies within the period of time during which a petition for review could be timely filed by the appellant's ADC with the CAAF without filing a request for reconsideration to us and without the filing of a petition for a grant of review or a certificate or review to the CAAF, this court and the CAAF have concurrent jurisdiction to decide a motion for abatement. The ADC could properly file a motion to abate before either court.

Abatement

The appellant requests that we abate the proceedings as we did under similar facts in *Foster*. We decline to do so.

In *Foster*, as in this case, the appellant died after the date of our decision, but before the time limit for reconsideration had exspired, without filing a motion for reconsideration with our court or a petition for a grant of review before the CAAF. In *Foster*, we granted the motion to abate, citing *United States v. Anderson*, 19 M.J. 295

(C.M.A. 1985)(summary disposition) and *United States v. Kuskie,* 11 M.J. 253 (C.M.A. 1981).

But, in *Rorie*, under very similar facts, our superior court overruled *Kuskie* and declined to abate the proceedings. The CAAF adopted the policy of the Supreme Court to reject abatement when an appellant dies while petitioning for a writ of certiorari. "When an appellant dies pending an Article 67(a)(3) appellate review by this Court, we will dismiss or deny the petition but will not abate the action ab initio." *Rorie*, 58 M.J. at 407.

The CAAF noted that, despite the Supreme Court's decision, the Federal Circuit Courts of Appeal have unanimously followed a policy of abatement when a criminal defendant dies before the completion of appellate review, "largely on the basis that an appeal to the circuit court is a matter of right, whereas certiorari is discretionary review before the Supreme Court." *Id.* at 402. "We believe that the initial review by a Court of Criminal Appeals provides a military defendant with a substantive legal and factual review." *Id.* at 404.

The CAAF allowed the service Courts of Criminal Appeals to decide upon their own abatement policy. "In view of our conclusion that an appeal to the Courts of Criminal Appeals is an appeal of right, we leave to those courts or the Judge Advocates General to establish the parameters of a policy of abatement in the event that an appellant dies pending review at a Court of Criminal Appeals." *Id.* at 407. As noted above, we hold that an appellant who dies within the period of time during which a petition for review could be timely filed with the CAAF, without action that would divest our court of jurisdiction, is still pending review before our court.

We hold that, since appeal to our court is a matter of right for those cases that meet the criteria under Article 66, UCMJ. we will follow the unanimous policy of the Federal Circuit Courts of Appeal to abate *ab initio* the conviction of an appellant who dies on or before the date of our decision.[2] On the other hand, we hold that once our decision has been rendered, the appellant has received the appeal of right mandated by Article 66, UCMJ. Reconsideration is clearly a discretionary matter for which the appellant has no absolute right.

We therefore hold that where an appellant dies after the date of our decision but within the period of time during which a petition for review would be timely filed with the CAAF, without action to divest our court of jurisdiction, a request for abatement will be denied. To the extent that *Foster* holds otherwise, it is overruled.

Conclusion

Accordingly, the motion to abate the final judgment is denied.

Chief Judge DORMAN, Senior Judge RITTER, Senior Judge PRICE, Judge SCOVEL, Judge HEALEY, Judge SUSZAN, Judge HARRIS, Judge WAGNER, and Judge REDCLIFF concur.

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[2] If the decision was published, it may still be cited as authority, but with the notation that the decision was vacated on other grounds.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX C

IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE C.L. CARVER, W.L. RITTER, R.W. REDCLIFF

UNITED STATES

v.

Brandon T. RIBAUDO
Private (E-1), U.S. Marine Corps

NMCCA 200301672
Decided 4 December 2003

Sentence adjudged 20 February 2003. Military Judge: J.P. Colwell. Review pursuant to Article 66(c), UCMJ, of convened by Commanding Officer, Marine Corps Combat Service Support Schools, Training Command, Camp Lejeune, NC.

LCDR BRENT FILBERT, JAGC, USNR, Appellate Defense Counsel
LCDR ERIC J. MCDONALD, JAGC, USN, Appellate Defense Counsel
CDR ROBERT P. TAISHOFF, JAGC, USNR, Appellate Government Counsel

After careful consideration of the record, submitted without assignment of error, we affirm the findings and sentence as approved by the convening authority. Art. 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c).

For the Court

R.H. TROIDL

Clerk of Court

APPENDIX D

1. Section 867 of Title 10, United States Code, provides in relevant part:

(a) The Court of Appeals for the Armed Forces shall review the record in--

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of--

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the

Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

2. Section 871 of Title 10, United States Code, provides in relevant part:

(c) (1) If a sentence extends to death, dismissal, or a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and--

(A) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

(B) such a petition is rejected by the Court of Appeals for the Armed Forces; or

(C) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and--

(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(ii) such a petition is rejected by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(2) If a sentence extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action on that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

3. Article I, Section 8, Clause 14, of the United States Constitution provides that Congress shall have power "To make Rules for the Government and Regulation of the land and naval Forces."

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 05-0117/MC
Crim.App. Misc. No. 03-1672

UNITED STATES, Appellee

v.

Brandon T. RIBAUDO, Private
U.S. Marine Corps, Appellant

On consideration of Appellant's petition for reconsideration of this Court's decision, 62 M.J. 286 (C.A.A.F. 2006), it is, this 15th day of February, 2006,

ORDERED:

That said petition for reconsideration be, and the same is hereby denied.

For the Court,

William A. DeCicco
Clerk of the Court